IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 117

FRANK D. THOMPSON
TRUSTEE IN BANKRUPTCY OF
HERBERT E. MOORE, BANKRUPT
PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Plaintiff's Brief.

EDWARD H. DEAVITT,
Attorney for Plaintiff

Statement of Case.

This is an action of general assumpsit brought by Frank D. Thompson, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff in Error, against Henry Fairbanks, Defendant in Error, in the Caledonia County Court for the State of Vermont, to recover as assets of said Bankrupt's Estate the sum of $922.08, and interest, the same being the net avails received by the defendant from the sale of said bankrupt's livery property by Lorenzo Sulloway, a sheriff.

The defendant pleaded the general issue, with notice in accordance with the statute.

The matter was referred to a Referee for a hearing on the facts, his report on the facts was filed at the December Term, 1902, of said Caledonia County Court, and a *pro forma* judgment on the same was rendered for the defendant.

The case was heard at the May Term, 1903, of the Supreme Court of Vermont on exceptions by the plaintiff, and at the same term the judgment of the lower court was affirmed.

The case is before this Court on a writ of error to the Supreme Court of Vermont.

The facts are as follows:

The bankrupt during the time of the transactions hereinafter mentioned conducted a livery business in St. Johnsbury in said County of Caledonia, in buildings owned by the defendant. The defendant at various times assisted the bankrupt in raising money to conduct said livery business.

April 15, 1891, said bankrupt executed and delivered to the defendant a chattel mortgage on all his livery property, the description of the property in said mortgage

being as follows: "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition in said mortgage was as follows: "Upon condition that if I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void, otherwise of force."

The affidavit in the mortgage was as follows:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the conditions thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business."

The bankrupt continued in said livery business and made sales, purchases and exchanges of said livery stock so that on March 5, 1900, and at all times thereafter, there remained of the livery property on hand April 15, 1891, only two horses called "Tom" and "Mattie" respectively. The bankrupt remained in the absolute possession of said livery property until May 7, 1900, and the defendant never took possession of any of said livery property until the taking of May 16, 1900, hereinafter mentioned.

On March 5, 1900, the bankrupt executed and delivered to the defendant a second chattel mortgage of said livery property to secure the same debts secured by the mortgage of April 15, 1891, and on March 23, 1900, the defendant assigned all his "right, title, interest and estate in and unto the property conveyed by" this mortgage to the Passumpsic Savings Bank, who held said mortgage at all times thereafter.

Shortly prior to March 5, 1900, the bankrupt became, and continued, wholly insolvent.

May 7, 1900, one John Ryan sued out a writ against the bankrupt and placed an attachment upon this livery stock to the amount of five hundred dollars. One Wilbur Worthen, a deputy sheriff, made this attachment by lodging a copy of the writ in the town clerk's office as provided by statute.

On May 16, 1900, one Lorenzo Sulloway, a sheriff, by direction of the defendant, and with the consent of the bankrupt, took possession of all this livery property by virtue of the chattel mortgage of April 15, 1891, for the purpose of selling the same. At that time the bankrupt was contemplating going into bankruptcy. The defendant knew this, knew that the bankrupt was insolvent, and knew of the Ryan attachment of May 7, 1900, and understood, at that time, that it was probable that that attachment would hold good as against his mortgage. He had the officer take possession of the property with the purpose on his part to thereby perfect his lien on said property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. The bankrupt consented that the property should be so taken and sold under the mortgage, but he did not consent that the avails of the sale should be applied on the defendant's debt.

The arrangement for taking and selling the property was made between one Dunnett, attorney for the bankrupt, and one Stafford, attorney for the defendant. By this arrangement the officer was to sell the property under the mortgage and hold the avails of the sale in place of the property for whoever turned out to be entitled thereto. Mr. Stafford asked one Howe, attorney for Ryan, to consent to this arrangement but he refused.

On June 11, 1900, the sheriff sold the livery property under the mortgage, and at some time thereafter paid the proceeds of the sale, $922.08, to the defendant, but the date on which this money was paid to the defendant does not appear. The officer's return of said sale was made July 10, 1900, about a week after the bankrupt was adjudicated a bankrupt. At the time the officer took possession of the property, the bankrupt was owing the defendant $169.19, all of which accrued after the execution of the mortgage, while the defendant was holden as endorser upon the bankrupt's note for $525, at the First National Bank of St. Johnsbury, and upon his note for $2510.75 at the Passumpsic Savings Bank of St. Johnsbury. At the time the officer took possession of the livery property the note at the First National Bank was not due, but it became due before the sale, and was paid by the defendant. The note at the Passumpsic Savings Bank was not paid.

June 30, 1900, the bankrupt filed his voluntary petition in bankruptcy, was adjudged a bankrupt July 3, 1900, and on September 15, 1900, the plaintiff was appointed his Trustee in Bankruptcy. There have been proved against the estate claims to the amount of between $5000 and $6000. On September 15, 1900, the Passumpsic Savings Bank proved its note of $2510.75 against the estate.

For the purpose of defeating the effect of the defendant's taking possession of the livery property under his chattel mortgage as aforesaid, the plaintiff, before the commencement of this suit, brought his petition to the United States District Court for the District of Vermont to have the lien of Ryan's attachment preserved for the benefit of the bankrupt's estate, under section 67*f* of the Bankruptcy Act of 1898. The petition was dismissed by the Court, for the reason that the Court had doubts as to whether or not the mortgage was valid under the provisions of the Bankruptcy Act of 1898, and thought that "the trustee might be embarassed about enforcing the provisions of the Act, making the mortgage lien of the foreclosure proceedings void in his own name, and enforcing Ryan's lien by attachment, if it should be preserved here, in the sheriff's name, on the same property at the same time." *(Transcript of Record, pp. 40-43.)*

The defendant, in his notice filed with his plea, justified the seizure and sale of the property in question by virtue of the mortgage of April 15, 1891, and claimed it was a valid mortgage duly executed in accordance with the provisions of the Vermont Statutes governing chattel mortgages.

The sections of the Vermont Statutes governing the mortgaging of personal property read as follows:

"Sec. 2251. All personal property shall be subject to mortgage agreeably to the provisions of this chapter.

"Sec. 2252. A mortgage of personal property shall not be valid against any person except the mortgagor, his executors and administrators, unless the possession of the property is delivered to, and retained by the mortgagee, or the mortgage is recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same, or if he resides out of the state, in the town in which the property is situated.

"Sec. 2253. Each mortgagor and mortgagee or, in the absence of the mortgagee, his agent or attorney, shall make and subscribe an affidavit in substance as follows:

'We severally swear that the foregoing mortgage is made for the purpose of securing the debt *specified* in the conditions thereof, and for no other purpose, and that the same is a just debt, due, and owing from the mortgagor to the mortgagee.' Which affidavit with the certificate of the oath signed by the authority administering the same, shall be appended to such mortage, and recorded therewith.

"Sec. 2255. If such mortgage is given to indemnify the mortgagee against liability assumed, or to secure the fulfillment of an agreement other than the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated *specifically* in the condition of the mortgage, and the affidavit shall be so varied as to verify the validity and justice of such liability or agreement."

One of the plaintiff's claims before the State Court was that said mortgage was not executed in accordance with said provisions of the Statute, for that, (1) no debt was specifically described in the condition thereof, (2) that the debt the bankrupt owed the defendant on open account accrued after the execution of the mortgage, and that future advances, debts, and liabilities could not be secured by a statutory chattel mortgage, and (3) that the liability assumed by the defendant for the bankrupt was not specifically described in the condition of the mortgage and that therefore the mortgage was void, and the mortgaged property would pass to the trustee in bankruptcy, and cited in support of his claim, *Nichols vs. Bingham, 70 Vt. 320, Page vs. Ordway, 40 N. H. 253,*

Tarbell vs. Jones, 56 Vt. 312, Sherman vs. Estey Organ Co., 69 Vt. 355.

The Supreme Court of Vermont, however, avoided deciding this question, but treated the mortgage of April 15, 1891 as a common law chattel mortgage, *(Transcript of Record, pp. 50-55,)* and it will be so treated in this brief.

Ryan's attachment of May 7, 1900, was made in conformity with section 1103 of Vermont Statutes which reads as follows:

"When personal property is taken upon a writ of attachment or execution, the officer serving such process may lodge a copy of the same, with his return, in the clerk's office in the town where the property is taken, or if taken in an unorganized town or gore, the copy shall be lodged in the clerk's office of the county where such property is taken, which lodgment shall hold the property against all subsequent sales, attachments or executions, as if it had been actually removed and taken into possession of the officer."

And after an attachment in accordance with this statute, the officer is considered as having the legal custody of the attached property, and sufficient title and possession so as to maintain an action therefor against any one who removes or converts the same.

Lowry vs. Walker, 4 Vt. 76.
Putnam vs. Clark, 17 Vt. 82.
Thorp vs. Robbins, 68 Vt 53.
Barron vs. Smith, 63 Vt. 121.
Smith vs. Church, 27 Vt. 168.
Bucklin vs. Crampton, 20 Vt. 261.